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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1011

CORTES RANDELL,

Petitioner

vs.

GORDON K. BANZHOFF, JR.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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The Petition for Writ of Certiorari to the Supreme Court of Alabama ought to be denied. *McGee v. International Life Insurance Company,* 355 U.S. 220, in citing *International Shoe Co. v. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, *upheld* the jurisdiction of a California trial court on the basis of

"minimal contacts" which included only the facts that the insurance policy was delivered in California, premiums were mailed from there, and the insured was a resident of California at the time of death.

Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed. 1283, simply held that the Supreme Court of Florida had no personal jurisdiction over a trustee where the corpus of the trust was established in Delaware and where the State of Florida had no jurisdiction over the trust itself under Florida law.

The Petition for Writ of Certiorari neglects to quote the following paragraph from the Opinion of the Supreme Court of Alabama concerning the conduct of the Petitioner Randell:

> Taking the facts in a light favorable to appellee, he showed that appellant represented that *he* would sell the franchise; that *he* stated that, in fact, *he* had a buyer for the franchise; that, in fact, another franchise had been sold earlier to another investor in the Orlando area; that appellee relied on the representation to sell, and did not attempt to sell himself; that appellee is now damaged in that he is unable to sell the franchise without informing a prospective buyer that another franchise already exists in that area. The evidence was sufficient to show legal fraud or deceit. (Emphasis supplied).

The complaint in the case below sued both International Trade Exchange, Inc., a District of Columbia corporation; and Cortes Randell, *individually* and as agent, etc. Throughout the complaint, in every material allegation, both the corporation and Randell, as an individual, are sued. Indeed, in Paragraph 3 of the complaint, it is alleged that "(a)t all times material to this action, the Defendant, CORTES RANDELL, was acting *individually* and as agent for INTERNATIONAL TRADE EXCHANGE, INC., within the

line and scope of his authority to so act." (Emphasis supplied). Hence, a cursory reading of the complaint demonstrates that Randell was sued not only as an agent but in his capacity as an individual. The Alabama trial court, in its judgment, found the issues against both the corporation and against Randell, separately and severally.

Respondent has no quarrel with the principles of law enunciated in *Thames v. Gunter-Dunn, Inc.*, 373 So.2d 640 (1979). All that case holds is the jurisdiction over individual officers or employees of a corporation may not be predicated *merely* upon jurisdiction over the corporation itself; but that there must be a showing that the individual officers engaged in some activity that would subject them to the state's long-arm statute before *in personam* jurisdiction can attach. In the instant

case, the court below found, and the Supreme Court of Alabama noted in the quoted part of its Opinion above, that Mr. Randell personally and individually did certain acts. There was no assertion in the court below that the acts were done merely as agent of the corporation. The Petitioner Randell engaged in representations to the Respondent which form the basis of a finding of fraud by the trial court. Hence, it appears from the transcript of the evidence that the Appellant Randell had the minimum contacts with the State of Alabama. As noted in the Annotation to the Alabama Rules of Civil Procedure, 4.2, *Code of Alabama, 1975:* "... it is not necessary that the Defendant have been in the state or that it have had agents there."

In the instant case, the transcript of the evidence is replete with testimony

concerning the actions taken by the Petitioner Randell. The court below in finding the issues against both defendants, separately and severally, obviously found that the Petitioner Randell did some of the tortuous acts in his individual capacity. Indeed, the Supreme Court of Alabama in its extended opinion on rehearing wrote to this very point and the Chief Justice and three Justices thereof denied the Application for Rehearing.

The Supreme Court of Alabama is well aware of the requirements of due process of law. As stated in the Annotation to its Rule 4.2:

> Historically, only physical presence within the forum state or consent was a sufficient basis of *in personam* jurisdiction. *See Pennoyer v. Neff*, 95 U.S. 714 (1877). However, in recent years, there has been an explosive expansion of the due process clause in this area. This saga of

development, which is one of the most fascinating found in the annals of jurisprudence, has been told many times by courts and commentators. *See*, e.g. 4C. Wright & A. Miller, *Federal Practice and Procedure*, Sec. 1065-1969, at 211-66 (1969); Kurland, the Supreme Court, *The Due Process Clause and The In Personam Jurisdiction of State Courts--From Pennoyer to Deckla: A Review*, 25 U.Chi. L.Rev. 569 (1958); Annot., *Construction And Application of State Statutes or Rules of Court Predicating In Personam Jurisdiction Over Non-Residents or Foreign Corporations on the Commission of a Tort Within the State*, 24 A.L.R.3d (1960); Annot., *Validity As A Matter of Due Process, of State Statutes or Rules of Court Conferring In Personam Jurisdiction Over Non-Residents or Foreign Corporations on the Basis of Isolated Business Transactions Within the State*, 20 A.L.R.3rd 1201 (1968). As a result of this expansion, which has come about primarily because of the recognition of the increasing mobility and industrialization of American society which makes travel less of a hardship, service which a few years ago would have been considered obviously insufficient, is now considered valid. It is now generally recognized that if a defendant has certain "minimum contacts" with a forum

state, and it is fair and reasonable to exercise jurisdiction under the circumstances, that due process is not violated by subjecting the defendant to jurisdiction in the forum state. Professor Moore has summarized the current constitutional requirements in this area as follows:

The first requirement is that there must be some minimum contact with the state which results from an affirmative act of the defendant. But it is not necessary that the defendant have been in the state or that it have had agents there.

In addition to some minimum contact with the state, it must be fair and reasonable to require the defendant to come into the state and defend the action. In determining what is fair and reasonable, the court may consider factors associated with the doctrine of forum non conveniens, but need not give them over-riding importance. . . .

Based as they are on notions of fairness and reasonableness the Supreme Court decisions do not permit a simple generalization of the rule pertaining to in personam jurisdiction over foreign corporations. If there are substantial contacts with the state, for example

> a substantial and continuing business, and if the cause of action arises/out/of the business done in the state, jurisdiction will be sustained. If there are substantial contacts with the state, but the cause of action does not arise out of these contacts, jurisdiction may be sustained. If there is a minimum of contacts, and the cause of action arises out of the contacts, it will normally be fair and reasonable to sustain jurisdiction.
> . . .

The Petition for Writ of Certiorari to the Supreme Court of Alabama is due to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ira DeMent, Attorney for Respondent Banzhoff, hereby certify that I have served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama on Calvin M. Whitesell, Esquire, Attorney for Petitioner Randell, by depositing a copy of same, first-class postage prepaid, in the United States Mail, properly addressed to him at 771 South Lawrence Street, P. O. Box 2450, Montgomery, Alabama 36103, on this the 24th day of January, 1980.

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